Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 *(Access to Rights-of-Way)*	)))))	CC Docket No. 96-98

JOINT REPLY TO COMMENTS FILED IN OPPOSITION TO PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE EDISON ELECTRIC INSTITUTE AND UTC, THE TELECOMMUNICATIONS ASSOCIATION

Pursuant to Section 1.429 of the FCC's Rules, the Edison Electric Institute (EEI) and UTC, the Telecommunications Association (UTC) hereby respond to comments filed in opposition to their Joint Petition for Reconsideration and/or Clarification of certain issues addressed in the *First Report and Order*, FCC 96-325, released August 8, 1996, in the above-captioned matter. The EEI and UTC Petition was expressly limited to issues addressed at Section XI.B. (paragraphs 1119-1240) of the *FR&O* relating to access to rights-of-way by telecommunications service providers.

I. Introduction

At the outset it should be noted that EEI and UTC acknowledge that a number of electric utilities have an interest in entering into commercial telecommunications.[1] These

[1] See e.g., Report and Order establishing "Exempt Telecommunications Companies," GC Docket No. 96-101, released September 12, 1996.

utilities fully expect to be subject to the Act under the same terms and conditions as other similarly situated entities. However, these utilities and all others have a direct and overriding interest in maintaining the integrity of their electric facilities. Therefore in considering the merits of the various competing positions with regard to access issues it is essential that the Commission not lose sight of the fact that electric utilities design, own and maintain poles and other distribution facilities as an integral part of their obligation to provide reliable, safe and affordable electric service to the public. Contrary to the assertions of some cable and telecommunications companies which have attempted to attribute bad motives to the utility industry,[2] it must be recognized that third-party telecommunications attachments to utility facilities are an incidental use that should not be allowed in any way to undermine or detract from the primary purpose of these facilities -- the delivery of reliable, safe and affordable electric service. Given the FCC's limited jurisdiction over non-telecommunications facilities of electric utilities the FCC should narrowly construe the pole attachment provisions in order to minimize the impact on electric utilities and their customers.

The issues upon which EEI and UTC have sought reconsideration or clarification will not give electric utilities a competitive advantage in the telecommunications market. To the contrary, reconsideration and/or clarification of these issues will enable the FCC to more appropriately balance the legitimate operational requirements of utilities with the FCC's duty and desire both to promote cooperation between utilities and prospective attaching entities, and to increase the availability of facilities and services.

[2] Opposition Comments of Joint Cable Parties and National Cable Television Association (NCTA).

II. The FCC Must Reconsider Its Decision To Require Utilities To Exercise Rights Of Eminent Domain On Behalf Of Attaching Entities

In its petition EEI and UTC sought reconsideration of the FCC's decision in the *FR&O* to require utilities to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties. AT&T, MCI and the Joint Cable Parties oppose this request, arguing that utilities must be compelled to exercise their powers of eminent domain on behalf of third-parties or else the utilities will discriminate against competing providers of telecommunications.[3]

These parties do not raise compelling arguments. In addition to suggesting anti-competitive motives to utilities without any supporting evidence, these parties fail to recognize the fundamental point that eminent domain is a right granted to some utilities by state law to affect interests in real property for very limited purposes. As the Petitioners note, the exercise of eminent domain should not -- neither under our federal system can it -- be regulated or mandated by the FCC. AT&T appears to acknowledge this point but suggests that if a state law restricts the exercise of eminent domain the FCC can decide this on a case-by-case basis through the complaint process.[4] Such an approach would place an undue and unnecessary burden on utilities and is again precisely the type of sweeping requirement the Commission should avoid.

Moreover, none of the parties seeking broad use of utility powers of eminent domain seems to understand that utilities exercise the right of eminent domain only as a last resort, if at all. The exercise of this right carries a "cost" to the utility that cannot be

[3] MCI, p. 38; Joint Cable Parties, p. 19; and AT&T p. 35.
[4] AT&T, p. 35.

measured in dollars; for example, loss of goodwill and diversion of company time/resources to complex regulatory approval processes, and often litigation over property valuation. Given the on-going movement of the utility industry into a competitive environment the associated "costs" to the utility of its use of eminent domain dictate that it be used in an exceedingly spare manner.

Rather than requiring the utility to exercise its eminent domain, cable and telecommunications companies seeking access to facilities should be required to obtain their own authorizations and permits from the appropriate state and local bodies. If a particular state law restricts its grant of eminent domain in a discriminatory manner this may be an appropriate issue for the FCC to consider in a petition for preemption under Section 253.

EEI and UTC renew their request that the FCC eliminate any requirement, or even an implication, that utilities should exercise powers of eminent domain for the benefit of an attaching entity.

III. Reservation of Space By An Electric Utility

A. An Attaching Entity Allowed To Occupy Reserve Space Should Be Required To Reimburse The Pole Owner And All Other Attaching Entities If It Requires Modification Of The Facility When The Space Is Needed By The Utility

In the *FR&O* the FCC adopted a policy that will permit an electric utility to reclaim reserved space from an attaching entity when the utility has an actual need for the space. Under this policy the utility must give the attaching entity the opportunity to pay for the cost of any modifications needed to expand capacity in order to continue to

accommodate the required attachment.[5] In its petition EEI and UTC requested clarification that this policy must also be read in conjunction with Section 224(i) on the reimbursement of expenses when an attaching entity requires a modification that causes other attaching entities or the pole owner to rearrange their facilities. Specifically, the petitioners requested that the FCC make clear that the reimbursement policy of Section 224(i), as embodied in Section 1.1416(b), applies to an attaching entity in the reserve space who exercises the option of requesting modification of the facility when the utility recovers the reserve space for its own use.

All commenting parties appeared to agree with this request.[6] EEI and UTC therefore request the FCC to clarify this issue accordingly.

B. An Electric Utility's Reservation Of Space Above The "Communications" Space Should Be Considered Presumptively Reasonable

Some cable companies and telecommunications companies object to the Petitioners request that the FCC establish, at a minimum, a presumption that it would be reasonable for an electric utility to reserve any space above what traditionally has been referred to as "communications space." The opposition to this suggestion appears to be based in large part on a misunderstanding of the Petitioners' request. For example, the Joint Cable Parties, seeing a conspiracy at every turn, mischaracterize the EEI and UTC suggestion as an "effort to erect make-ready costs as a barrier to entry..."[7] As discussed

[5] Mandatory access to any space on utility facilities, whether "reserved" or not, raises a Fifth Amendment issue.

[6] See, e.g., NCTA, p. 28; AT&T, p. 34.

[7] Joint Cable Parties, p. 7.

above, the *FR&O* adopted a policy of allowing a utility to reclaim reserved space at such time as the utility requires access to that space. Reservation of space by a utility does not deny access to space; it simply allows a utility to reclaim space for which it has already paid. Therefore, the recommendation does not act as a barrier to entry but merely establishes a presumption of what is a reasonable reservation of space by a utility.

As the Petition noted electric utilities have heretofore generally not been required to create, or submit for public scrutiny, "development plans" respecting facility expansion in the detail necessary to reflect how expansion could impact access to or use of their poles or other facilities. Further, it is questionable whether the FCC has the requisite experience, expertise or resources to determine what constitutes a reasonable reservation of space by a utility on a facility-by-facility basis. Accordingly, the adoption of a minimum presumption of what constitutes a reasonable reservation of space is warranted. Moreover, the Petitioners' recommendation that this presumption encompass the reservation of any space above what traditionally has been referred to as "communications space" is entirely appropriate.

Historically, the space above the communications space has been utilized almost exclusively by electric utilities. The Joint Cable Parties have misinterpreted EEI's and UTC's position on this point. By recommending that the FCC create a presumption that it is reasonable for a utility to reserve all space above the communications space, the Petitioners were not referring to all space above "the lowest usable space on the pole where telephone and cable facilities are attached," as claimed by the Joint Cable Parties.[8]

[8] Joint Cable Parties, p. 7

To the contrary, the Petitioners were merely recommending that it be presumptively reasonable for a utility to reserve space above the highest point at which telephone and cable facilities are typically attached.

IV. Modifications

A. The FCC Should Clarify Circumstances Under Which Utilities Will Be Required To Notify Attaching Entities Of Facility Modifications

The Petitioners requested the FCC to clarify that the 60-day notification requirement for facility modifications should not be construed to limit a utility's ability to promptly serve new customers. MCI opposes this request on the basis that "utilities themselves want 60 days notice from requesting carriers" and argue that utilities should "provide the same advance notice to their potential competitors."[9]

MCI's argument underscores the fundamental misunderstanding of attaching telecommunications companies. Electric utilities require sufficient time to evaluate the safety and engineering implications of a new third-party telecommunications attachment on the electric system. In contrast, when a utility modifies its own facilities, the modifications are designed and implemented, by definition with the impact of the power system considered at every step of the process. Hence, there is no need to separately evaluate this impact, as with third-party telecommunications attachments. If a utility is not engaged in the offering of telecommunications services there is no policy reason for reciprocity of notice because the electric utility is not competing with the attaching entities.

[9] MCI, p. 42.

B. Facility Modifications Made By A Utility To Comply With Changes To The NESC Should Not Obligate the Utility To Share In the Cost Of A Pole Change-Out Requested By An Attaching Entity

In the *FR&O*, the FCC indicated that "[a] utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost." The Petitioners requested clarification of this policy as related to compliance with safety standards, such as the NESC. As the Petitioners explained, under the "grandfathering" provisions of the NESC, utilities do not have to modify a facility to meet code changes unless and until something more than a minimal amount of other work is done. If that other work is necessitated only because of the utility's obligation to allow attachments, it would not be fair to require the utility to bear the whole cost of the compliance upgrade.

AT&T is alone in opposing this request. AT&T argues that such an exception would allow utilities to "game the system, by postponing other modifications that would trigger the requirement to bring facilities into compliance."[10] The flaw in AT&T's argument is that it overlooks the fact that but for the request of the attaching entity, the utility would not have been required to modify its facilities at all. AT&T's arguments also assumes, wrongly, that a utility would intentionally withhold modification of the power system on speculation that an attaching telecommunications carrier will request a facility modification first.

[10] AT&T, p. 40.

Implicit in AT&T's complaint is the suggestion that electric utilities should be compelled to construct facilities for the benefit of third-party telecommunications companies. The FCC should reject these continuing efforts by attaching entities to view the Act as imposing some sort of social policy obligation on electric consumers to subsidize telecommunications companies.

Petitioners therefore renew their request that a utility not be required to share in the cost of a proposed facility change-out where the only modifications that will be made by a utility as a result of the change-out are those modifications necessitated by changes in the NESC since the existing facilities were installed.

V. State Requirements Affecting Pole Attachments Should Be Accorded Preemptive Authority To The Extent They Do Not Violate Section 253

The Petitioners requested clarification that where a state has certified that it regulates rates, terms and conditions for pole attachments, its regulations in this area are not only entitled to deference but themselves have preemptive effect to the extent they do not directly violate Section 253 by acting as a barrier to entry. Further, the Petitioners requested the FCC to clarify that where a state regulates access to poles, the state's regulation has preemptive effect irrespective of any certification to the FCC or procedural requirements associated with such regulation, but again, subject to the conditions of Section 253.

Petitioners urge the FCC to reject NCTA's request that states be required to certify as a precondition to regulating access. Section 224(c)(3), which establishes the conditions for a state to "reverse preempt" the FCC's pole attachment authority, only relates to regulation of "rates, terms and conditions." State regulation of "access to poles,

ducts, conduits, and rights-of-way as provided in subsection (f)" has preemptive effect under Section 224(c)(1) without regard to certification to the FCC or any procedural requirements for handling complaints. Thus, for example, where a local authority has established requirements regarding shared access to and use of utility infrastructure, such requirements are entitled to preemptive effect under Section 224(c). Such an interpretation is not only consistent with a plain reading of the statute, but also recognizes established state and local requirements regarding access to utility facilities. Provided that these requirements do not act as a discriminatory barrier to entry under Section 253, this authority should remain in place.

Further the FCC should disregard NCTA's argument that the reverse preemption rules require that a state's access requirements conform to the FCC's access provisions. NCTA asserts that 224(c)(1) requires that a state's preemption of access requirements must be consistent with what the FCC adopted under section 224(f).[11] However, an actual reading of the section 224(c)(1) reveals that the reference to section 224(f) is not meant to impose any substantive standards on the states but instead specifically clarifies that FCC jurisdiction under this section is preempted by states that choose to exercise their reverse preemption authority.

VI. Conclusion

Despite the cable companies' unfounded allegations of improper motive on the part of electric utilities, the FCC should recognize the legitimate interests of electric utilities in maintaining the integrity of their electric systems and in mitigating the

[11] NCTA, p. 32, fn. 111.

imposition of unwarranted costs on their customers and shareholders. Accordingly, the FCC should reconsider and/or clarify certain portions of its *FR&O* in order to better meet the interests of all parties impacted by the Act's access requirements

WHEREFORE, THE PREMISES CONSIDERED, EEI and UTC request the Federal Communications Commission to take action in accordance with the views expressed above.

Respectfully submitted,

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Dated: November 12, 1996

CERTIFICATE OF SERVICE

I, Ryan Oremland, hereby certify that I have caused to be sent, on this 12th day of November 1996, a copy of the foregoing to each of the following:

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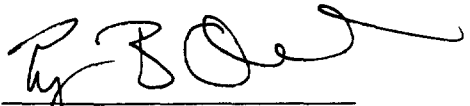

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